

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re:

Case No. 10-31037-DHW
Chapter 13

AURELIA WILLIAMS,

Debtor.

AURELIA WILLIAMS,

Plaintiff,

v.

Adv. Proc. 14-03118

RESURGENT CAPITAL SERVICES, L.P.,

Defendant.

**REPORT AND RECOMMENDATION
OF BANKRUPTCY JUDGE DWIGHT H. WILLIAMS, JR.
TO THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA**

In this adversary proceeding, the Plaintiff alleges that the Defendant violated the Fair Debt Collection Practices Act (hereinafter "FDCPA"), 15 U.S.C. § 1692 et. seq., by filing a time-barred proof of claim in the Plaintiff's underlying bankruptcy case.¹ The Defendant filed a motion to dismiss the adversary proceeding pursuant to F.R.B.P. 7012(b)(6). There, the Defendant alleges that the Plaintiff's own FDCPA claim is time-barred by the applicable statute of limitations. For the following reasons, the undersigned recommends that the district court grant the Defendant's motion to dismiss.

¹The complaint also alleged a count for abuse of process, however, the Plaintiff voluntarily withdrew her abuse of process claim in her response to the defendant's motion to dismiss (Doc. #8).

JURISDICTION

The court's jurisdiction in this matter is derived from 28 U.S.C. § 1334 and from an order of The United States District Court for this district wherein that court's jurisdiction in title 11 matters was referred to the Bankruptcy Court. *See* General Order of Reference [of] Bankruptcy Matters (M.D. Ala. Apr. 25, 1985). However, because the dispute here does not involve a core proceeding under 28 U.S.C. § 157(b)(2) and merely invokes the bankruptcy court's "related to" jurisdiction, this court's jurisdiction does not extend to the entry of a final order or judgment.

FACTUAL FINDINGS

The relevant facts are few and undisputed. The Plaintiff filed the underlying chapter 13 petition in this court on April 22, 2010, and listed Merrick Bank as a creditor in the bankruptcy proceeding. On May 6, 2010, the Defendant filed a proof of claim on behalf of Merrick Bank. On September 22, 2014, the Plaintiff filed an objection to the claim of Merrick Bank (Case No. 10-31037, Doc. #65) on the grounds that the claim was time-barred. On November 4, 2014, an order entered sustaining the Plaintiff's objection to the Merrick Bank claim (Case No. 10-31037, Doc. #78) and disallowing the same. On October 7, 2014, the Plaintiff filed the instant adversary proceeding which alleged that the Defendant had violated the FDCPA by filing a time barred-proof of claim in the underlying bankruptcy case.

CONCLUSIONS OF LAW

In considering a motion to dismiss under F.R.C.P. 12(b)(6), the court accepts all of the plaintiff's well-pleaded factual allegations as true and construes them in her favor. *Lopez v. First Union Nat. Bank of Fla.*, 129 F.3d 1186, 1189 (11th Cir. 1997). Therefore, to survive a motion to dismiss, the complaint must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 566 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). The claim is plausible when the facts alleged are "enough to raise a right to relief above the speculative level....." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007).

The statute of limitations for an alleged FDCPA violation requires that the action be commenced "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d); *see also Maloy v. Phillips*, 64 F.3d 607, 608 (11th Cir. 1995).

While the Eleventh Circuit has not addressed the issue of when the statute begins to run for an alleged FDCPA violation based upon the filing of a proof of claim in bankruptcy, courts that have considered that issue conclude that the statute begins to run with the filing of the proof of claim. *See In re Simmerman*, 463 B.R. 47, 65 (Bankr. S.D. Ohio 2011); *Kline v. Mortgage Electronic Sec. Systems*, 659 F.Supp. 2d 940, 952 (S.D. Ohio 2009); *In re Rice-Etherly*, 336 B.R. 308, 313 (Bankr. E.D. Mich. 2006). This persuasive authority and the plain language of the statute convince this court that the statute of limitations begins to run on the date the violation occurs; that is, the date of the filing of the stale proof of claim.

The Plaintiff, however, urges the court to accept the proposition that the violation continues to occur for so long as the claim is allowed. In short, Plaintiff maintains that the violation is refreshed with each day that the claim is not withdrawn voluntarily by the claimant or disallowed by the court. Plaintiff cites to no authority supporting that proposition, and the court is aware of none. Instead the court is impressed by the reasoning expressed in *In re Simmerman*:

.... the Simmermans argue that “Ocwen’s unlawful attempts to collect on [the Simmermans’] mortgage are ongoing and continuing.” However, in making the argument, the Simmermans do not point to a single offending act by Ocwen that occurred after the filing of the proof of claim nor did the court find any allegations of subsequent violating acts in review of the Simmermans’ complaint. Such a vague assertion of “ongoing and continuing” or “repeated” offending acts, without further factual detail, is not sufficient to survive dismissal under *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955 (noting that a complaint does not suffice if it tenders “a naked assertion” devoid of “further factual enhancement”).

463 B.R. at 64-5. In this case, the Plaintiff does not point to any single offending act committed by the Defendant subsequent to its filing the stale proof of claim. Indeed, the only volitional act of the Defendant was the filing of the offending claim. Hence, the court can find nothing here that would indicate that the violation is a continuing or repeated one.

Additionally, “[a]lthough . . . there does not appear to be controlling Eleventh Circuit direction, numerous courts have rejected the contention that an action taken in an existing state court collection proceeding is a ‘new’ violation or a continuing violation, for limitations purposes.” *Farrell v. Patrick A. Carey, P.A.*, 2012 WL 6803654 *3 (M.D. Fla. 2012)(citing several cases which support this determination).

In fact, courts have held that “where statements concerning the status of a debt are new communications concerning an old claim, the statements do not start a fresh statute of limitations period.” *Reese v. JPMorgan Chase & Co.*, 686 F. Supp. 2d 1291, 1310 (S.D. Fla. 2009) (citing *Nutter v. Messerli & Kramer, P.A.*, 500 F. Supp. 2d 1219, 1223 (D. Minn. 2007)). “The course of litigation is not, in itself, a ‘continuing violation’ of the FDCPA. . . . For conduct during litigation to be actionable, a plaintiff must allege, and on summary judgment offer proof, that the conduct is a violation of the FDCPA independent of the act of filing suit.” *Schaffhauser v. Burton Neil & Associates*, 2008 WL 857523 *2-3 (M.D. Penn. 2008); see e.g. *Crossman v. Asset Acceptance, LLC*, 2014 WL 2612031 (M.D. Fla. 2014) (holding that the limitations period began when the creditor failed to file the required satisfaction of judgment and the creditor’s failure to correct the error was not a continuing violation and thus it did not extend the limitations period), *Perez v. Bureaus Investment Group No. II, LLC*, 2009 WL 1973476 (S.D. Fla. 2009) (holding that the limitations period begins with service of the complaint), and *Calka v. Kucker, Kraus & Bruh, LLP*, 1998 WL 437151 *3 (S.D.N.Y. 1998) (declining to hold that the filing of an amended complaint and summary judgment motions in a state collection action were new violations of the FDCPA and holding that for the purposes of the limitations period, the violation accrued on the date the state action was filed).

As previously stated, in this case, the only volitional action taken by the Defendant was the filing of the proof of claim. “[T]he filing of a proof of claim is analogous to the filing of a complaint in a civil action.” *O’Neill v. Continental Airlines, Inc. (In re Continental Airlines)*, 928 F.2d 127, 129 (5th Cir. 1991). The Defendant’s continued participation in the bankruptcy proceedings and failure to withdraw the offending claim are not independent actions separate from the filing of the proof of claim. Therefore, such actions are not new violations of the FDCPA for the purposes of the statute of limitations. Thus, these actions relate back to the filing of the proof of claim and the limitations period began on that date. The Plaintiff’s FDCPA claim was filed outside the one year statute of limitations.

CONCLUSION

For the reasons set forth above, the undersigned recommends that The United States District Court grant the Defendant’s motion to dismiss this adversary proceeding under F.R.B.P. 7012(b)(6).

Done this the 2nd day of April, 2015.

A handwritten signature in black ink, reading "Dwight H. Williams, Jr." in a cursive script.

/s/ Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Richard D. Shinbaum, Plaintiff's Attorney
Neal D. Moore, III, Defendant's Attorney
Trustee